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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1955.

No. 467

SAMMY KAYE AND DAVID KRENGEL,
Petitioners,

vs.

L. C. SMITHERMAN AND SIMON COHEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I. OPINIONS OF THE COURTS BELOW.

No opinion was filed by the District Court. The opinion of the Court of Appeals is printed in an appendix, *infra*, pp. A4-A24. It has not yet been published in the Federal Reporter, Second Series.

II. JURISDICTION AND GROUNDS FOR ALLOWANCE OF THE WRIT.

The judgment of the Court of Appeals is dated and was entered July 18, 1955 (R. 28).

Petition for rehearing was denied on September 7, 1955 (R. 38).

Jurisdiction to review the judgment of the Court of Appeals is conferred upon this court by Section 1254 of the Judicial Code, 28 U. S. C. A., Sec. 1254.

The grounds relied upon for allowance of the writ are the following:

1. The Court of Appeals decided the case upon an issue of fact, never raised in the trial court nor passed upon by that court and upon which petitioners have had no opportunity to present evidence.

2. The action of the Court of Appeals in affirming in major part the judgment of the district court upon the basis of an issue of fact raised for the first time in the Court of Appeals and determined by that court is in conflict with the decisions of this court in *Peck* v. *Heurich*, 167 U. S. 624 and *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, and is probably in conflict also with the decisions of this court in *Virginian Railway Co.* v. *Mullens*, 271 U. S. 220, and *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80.

3. The action of the Court of Appeals in affirming in major part the judgment of the district court upon the basis of an issue of fact raised for the first time in the Court of Appeals and determined by that court is in con-

flict with the following decisions of the United States Court of Appeals in other circuits:

D. C. Cir., *In re Adoption of a Minor*, 194 F. 2d 325.

3 Cir., *Bowles* v. *Hayes*, 155 F. 2d 351.

7 Cir., *Hubshman* v. *Louis Kerr Shoe Co.*, 129 F. 2d 137.

9 Cir., *Waialua Agricultural Co.* v. *Maneja*, 216 F. 2d 466, rev. on other grounds 349 U. S. 254.

4. The action of the Court of Appeals in determining the case upon an issue of fact upon which petitioners have had no opportunity to present their evidence is such a departure from the accepted and usual course of judicial proceedings and fundamental principles of justice as to call for exercise of this court's power of supervision.

5. The action of the Court of Appeals in determining the case upon an issue of fact upon which petitioners have had no opportunity to present their evidence is a violation of the rights guaranteed by the Fifth Amendment to the Constitution of the United States.

III. QUESTION PRESENTED FOR REVIEW.

May the Court of Appeals affirm a judgment of a District Court by itself making a finding of fact upon an issue which was not raised in the trial court and upon which the appellants have been afforded no opportunity to present their evidence?

IV. CONSTITUTION, STATUTES AND RULES INVOLVED.

The following provisions of the Constitution, statutes, and Federal Rules of Civil Procedure are involved:

Constitution, Amendment Five.

Statutes:

28 U. S. C. A., Section 1291.
28 U. S. C. A., Section 2106.

Rules of Civil Procedure:
Rule 8(c).
Rule 12(h).
Rule 15(b).
Rule 52(a).

Each of the foregoing is set out in full in the appendix.

V. STATEMENT OF THE CASE.

Jurisdiction of the trial court was based upon diversity of citizenship (Complaint, R. 4, Findings 1-3, R. 40).

The suit was one to impress a trust upon oil leases acquired by respondents, joint adventurers with petitioners, in violation of the fiduciary duty owed by them to petitioners (Complaint R. 4-7, Opinion, *infra*, p. A4).

Upon the trial the contest was over the existence of a fiduciary duty upon the part of respondents and over their asserted defense of laches and the court's findings are confined to those subjects (Findings R. 40-55). It appeared only incidentally on the trial that respondents had made transfers to other persons of interests in the leases. Respondents did not plead transfers to others, nor anything else, in partial avoidance of petitioners' claim (Ans. R. 23-27). On the contrary, in their opening statement and briefs in the trial court they made reference to the fact that, having made transfers of interests to others, they would be left without any interest if petitioners pre-

vailed[1] (R. 90, 512). Petitioners only claimed a one-half interest in the leases and respondents still retained at least that large an interest in each lease, so that it was immaterial to petitioners what transfers respondents might have made of their own one-half interest (Opinion, *infra*, pp. A22-A23).

The trial court filed findings of fact and conclusions of law which resolved the issues in favor of petitioners and determined that respondents had acquired the leases as joint adventurers with petitioners and with intent to defraud petitioners concealed their acquisition of the leases and appropriated them to themselves. In the conclusions of law respondents were determined to be constructive trustees for petitioners to the extent of petitioners' one-half interest in the leases (Findings and conclusions, R. 40-55, Opinion, *infra*, pp. A4-A15).

After the court had filed findings and conclusions respondents changed position, and in a motion directed at the findings and conclusions they asserted for the first time that they had transferred interests to others and should be chargeable only to the extent of one-half of the interest they still retained on the date suit was filed. As stated in the opinion of the Court of Appeals, "The defendants' motion directed at the original findings and conclusions was founded entirely upon the premise that although defendants breached their fiduciary duty owed to plain-

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[1] "They now want Smitherman and Cohen's one-half interest, which would mean they would have nothing" (R. 90, 512). "In addition to what has been said, there are obvious reasons and considerations why plaintiffs' claim to a one-half interest—all the interest Smitherman and Cohen own—in the Bergkamp Block should not be sustained" (R. 512). "Plaintiffs now seek to recover the remaining one-half interest, so that Smitherman and Cohen would have exactly nothing left for their efforts. * * *" (R. 512).

tiffs and intentionally concealed their default in order to prevent discovery, they as joint adventurers still had the power to bind their plaintiff co-adventurers by assignments to strangers of interests in the subject matter of the joint adventure" (Opinion, *infra*, pp. A22-A23; Motion, R. 55-57; Argument on motion, R. 509-517).

The trial court accepted this theory of respondents and reduced petitioners' recovery to one-half of the interest respondents still retained when suit was filed (Amended findings and conclusions, R. 61-64). Petitioners appealed.

The Court of Appeals held that this ruling was erroneous for three reasons:

1. As trustees *ex maleficio* respondents lacked authority to deal with petitioners' interest in the leases.

2. As between themselves a joint adventurer must have express authority to dispose of any interest other than his own in the joint property.

3. The defense was not available because it was not pleaded (Opinion, *infra*, pp. A21-A24).

Anticipating such a decision by the Court of Appeals, respondents changed position again and, for the first time, asserted in their brief in the Court of Appeals a contention that as to a 914 acre block of leases respondents had agreed with Frank Rice and Ronald Rice to share the block prior to the time respondents acquired it. This theory was, of course, in direct conflict with their trial court theory that they, as joint adventurers, had bound petitioners by their transfers to the Rices (Motion, R. 55-57, Argument on motion, R. 509-517). Since the trial court had never heard of this contention, it had, of course, made no findings in relation to it (Findings R. 40-55, 61-63).

Respondents themselves had proved by documentary evidence that they had acquired this block of leases from C. L. Seibel by written contract dated and executed November 5, 1951 (Defendants' Exhibit F, R. 291, 552).

This new factual contention, if entertained by the court, made material for the first time the question of whether respondent Smitherman's arrangement with the Rices was made prior or subsequent to November 5, 1951. Respondent Smitherman had testified:

Direct Examination.

"I think I talked to the Rices on it about that time, and after I talked to him about it, to see if they'd go in on it and they said, yes, they would go, and I told him to go ahead, we would make a deal" (R. 339).

Cross Examination.

"Q. Now, if I understood you correctly, you talked to Ronald Rice and Frank Rice about what has been referred to by the defendants as the Bergkamp block before you took the deal on, is that right?—A. *No; we already told Mr. Seibel we would take the deal on before—we took Rices up there and they looked at the deal.*

"Q. *Before you took the Rices down there?*—A. *Yes.*

"Q. Well, now, did you talk to the Rices before you took it on, or afterwards?—A. About the same time.

"Q. About the same time?—A. Yes.

"Q. Well, was it necessary that you know that the Rices were interested before you took it on from Seibel?—A. *No; we were going to take it on anyway. It didn't make any difference whether the Rices were interested or not*" (R. 367).

The only other testimony in the record on the subject was that of Ronald Rice and Frank Rice. Their testimony

on the subject got into the record in a rather odd fashion. Petitioners offered parts of their depositions, but nothing which related to this subject. On respondents' motion the court compelled petitioners to offer their entire depositions (R. 179, 180). Only those portions relied upon by petitioners were read aloud or referred to in any fashion in the trial court and the trial court never heard, read nor considered the testimony of the Rices on this subject.

Both Rices had testified in their depositions that they were in the vicinity of the McKay No. 1 discovery well on only one occasion after its drilling was commenced and that it was on that occasion that they agreed with respondent Smitherman to take a half interest in the 914 acre block (R. 189, 190, 225, 226).

In the trial court the date of that occasion was completely without significance or importance to anyone, but in the Court of Appeals it became a question of whether that occasion was on October 30, when a drill stem test was taken on the McKay No. 1 discovery well (Finding 29, R. 48) or whether it was November 8 or November 10, when the well was completed as a producing well.[2]

Ronald Rice testified:

> "Q. After you had this first conversation when was the next conversation you had with Smitherman about the acreage?—A. My father and I started to Texas early in November *when they were drilling this well in—this McKay well—I imagine about the 8th or 10th of November.*
>
> * * * * * * *

[2]Respondent Smitherman had testified that rotary drilling on the McKay No. 1 was finished on November 1, 1951 (R. 253), and that the well would normally be completed as a producing well by the use of cable tools a week or ten days later (R. 252).

"Q. Well, when you were down there at the time they were drilling it in what conversation took place?—A. Well, while we were there that next morning we talked to Mr. Clark ourselves about his royalty across the road.

"Q. Well, what conversation did you have with Smitherman? I am getting to that first.—A. Well, as far as the McKay block, I don't remember we had any more.

"Q. How about the Bergkamp block?—A. He took us up and showed us the Bergkamp block.

"Q. When was that?—A. About that same time.

"Q. When they were drilling this in, about November first?—A. About that time. I don't remember the date.

"Q. Where did he take you?—A. He took us up to the Bergkamp land.

"Q. And what conversation did you have?—A. Well, he said he had another deal up there, or was offered another deal that he could get and wanted to know if we wanted to go in on it.

"Q. What did you say?—A. Well, after thinking about it a little we told him we would take an interest in it.

"Q. You did at that same time?—A. I think we did.

"Q. At the same time you looked at it about November first?—A. At the time we were there.

"Q. At the time you were there, is that when you went and talked to Clark about the royalty?—A. Yes.

"Q. And you bought some of the royalty at that[3] time?—A. Yes.

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[3]The date is thus capable of exact ascertainment from the recorded royalty deed from Clark. Since the contention was never raised in the trial court, this deed was not in evidence. Completely off the record and only by way of showing the evidence petitioners could have produced if given an opportunity, this deed

'Q. And you went up to look at the Bergkamp? —A. Yes.

"Q. How many days were you down there?—A. Just over night" (R. 189, 190).

Frank Rice testified:

"Q. Now, when was the first time that you had any conversation with Smitherman about—or with Seibel or anyone else—about the leases in the Bergkamp block; the part that we have got colored in red here on exhibit 18?—A. I don't know the date but we went down there. He took us down to this block; Ronald and I, and showed us the block.

"Q. Is that the time that you were down there when they were *completing* the McKay number 1?—A. It seems to me like it was. * * *

* * * * * * *

"Q. The first time you went together?—A. Yes, the first time I know we went together. We were on our way south.

"Q. What I was thinking about was between the first time and the time you said you would take it on; do you suppose you were down there by yourself?—A. No, I don't think I was. I think Ronald was with me.

"Q. Were you down there at any time during the drilling of the McKay number 1?—A. *Just at the time they were bringing it in.*

"Q. Just at the time they were bringing it in?—A. Yes" (R. 225, 226).

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was dated and acknowledged November 10, 1951, five days after respondents had acquired the block by written contract. In addition, defendant Seibel (not a party to the appeal) testified in a discovery deposition that the purchase of the Clark royalty was made after the McKay No. 1 was completed as a flowing well (p. 145). This testimony also was not offered in evidence because respondents had not raised the contention.

The Court of Appeals weighed this evidence, disregarded respondent Smitherman's positive testimony on cross-examination and the testimony of the Rices that they were first present when the well was being completed and in some fashion not disclosed in the opinion found the *fact* to be that the occasion on which Smitherman offered participation in the block to the Rices was October 30, when the drill stem test was made, rather than November (8 or 10, when the well was completed. From this *fact*, it followed that Smitherman had agreed to share the block with the Rices before respondents acquired it from Seibel on November 5, 1951. The finding of fact of the Court of Appeals is stated, "We think, however, the evidence clearly established that before the assignments were made by Seibel to Smitherman, the latter had agreed that the Rices would receive a one-half interest in such leases and that in substance and legal effect Smitherman acquired for himself only a one-half interest in such leases and that he acquired the other one-half interest in such leases for the benefit of the Rices and was obligated to reassign such one-half interest to the Rices" (Opinion, *infra*, p. A21).

From that finding the Court of Appeals concluded that respondents should account to petitioners for only a one-fourth interest in the leases covering the 914-acre tract and affirmed that part of the trial court's judgment on that ground (Opinion, *infra*, pp. A21-A22).

VI. ARGUMENT.

It is a fundamental principle of English and American jurisprudence that every litigant is entitled to his day in court. To see that he gets it this court in 1897 placed a restriction upon affirmance of a judgment upon a ground not raised in the trial court. "A judgment cannot be af-

firmed upon a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error." *Peck* v. *Heurich*, 167 U. S. 624, at page 629.

In *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U S. 257, the doctrine was reaffirmed. In that case judgment was entered in favor of plaintiff upon a verdict. The judgment was affirmed upon the ground that the defenses were equitable and not legal and thus not cognizable at law. This contention had not been raised in the trial court. In reversing the judgment of the Circuit Court of Appeals, this court said (p. 267):

> "Applying this doctrine to the facts and circumstances which we have previously stated, we are of the opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."

In *Virginian Railway Co.* v. *Mullens*, 271 U. S. 220, where plaintiff sought to support a judgment upon a theory not litigated below, the court said, "After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below (p. 227).

In *Securities and Exchange Commission* v. *Chenery*, 318 U. S. 80, this court said (p. 88):

> "* * * But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. * * *"

That decision has definitely defined the power of the Court of Appeals in reviewing judgments rendered upon jury verdicts and in reviewing orders of administrative bodies, but apparently confusion still exists as to review of judgments of a district court sitting without a jury.

The Chenery decision was expressly applied by analogy to non-jury actions by the District of Columbia Circuit in *Re Adoption of a Minor*, 194 F. 2d 325. The Court of Appeals in other circuits applied the same rule, both prior and subsequent to the Chenery decision.[4]

The judgment sought to be reviewed is a plain departure from that principle by the Court of Appeals for the Tenth Circuit. The opinion plainly states that the defense upon which it upheld the major portion of the trial court's judgment was not pleaded below (Opinion, *infra*, p. A21), and that the theory which the Court of Appeals rejected was the only theory relied upon below on that point (Opinion, *infra*, pp. A22-A23). Nevertheless, the Court of Appeals assumed the function of a trial court and itself supplied the determination of fact upon which it affirmed the major portion of the trial court's judgment, although petitioners had no opportunity to present evidence on the point.

We have found no federal decisions affirming judgments upon issues of fact raised for the first time in the

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[4] "The failure of the trial court to find a fact essential to the defendant's recovery cannot be supplied by us, even if we thought the evidence in the record warranted it." *Hubshman* v. *Louis Kerr Shoe Co.*, 7 Cir., 129 F. 2d 137, at page 142. "The court below made no findings in respect to these questions of fact and it is not within our jurisdiction to resolve them." *Bowles* v. *Hayes*, 3 Cir., 155 F. 2d 351. "We are forbidden by statute, custom and rule from making new findings of fact, even where we believe these are demanded by the record." *Waialua Agricultural Co.* v. *Maneja*, 9 Cir., 216 F. 2d 466, at page 474, rev. on other grounds 349 U. S. 254.

appellate court, but there are cases in which the power has been asserted, but not exercised. Examples are *Baker* v. *Kaiser*, 8 Cir., 126 Fed. 317, and *Spann* v. *Commercial Standard Ins. Co.*, 8 Cir., 82 F. 2d 593. Both cases were decided prior to adoption of the Federal Rules of Civil Procedure, under which there is no longer a trial *de novo* on the record in an equity case. *United States* v. *Yellow Cab Co.*, 338 U. S. 338; *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485. Both cases also stated that the rule was limited to cases where it was clear that the evidence was fully developed on the issue and that no other judgment could possibly be reached.

The case at bar does not fit those specifications. The present record shows conflicts between the direct and cross-examination of respondent Smitherman, which could have been further developed if there had been any suggestion of such an issue. It shows that the testimony of the Rices as to when they first heard of the block could have been made certain by reference to a recorded mineral deed, if the issue had been raised. In addition there was already on file in the clerk's office a deposition which would have shown that the Rices weren't even in the vicinity until after completion of the McKay No. 1 as a flowing well.

The present case indicates the need for a specific extension by this court of the rule of *Securities and Exchange Commission* v. *Chenery Corporation*, *supra*, to suits in equity to the end that there be uniformity among the circuits as to the fact finding jurisdiction of the Court of Appeals in the review of non-jury cases.

Applying rule 12 (h), this court has refused to consider defenses not pleaded, although they were considered by the Court of Appeals. *McGrath* v. *Manufacturers Trust Co.*, 338 U. S. 241. In the case at bar, the Court of Appeals recognized that the defense upon which it affirmed the

judgment had not been pleaded (Opinion, *infra*, p. A21). It avoided that fact upon the theory of amendment by implication under Rule 15(b). But the Court of Appeals in the same opinion recognized, "That rule is applicable, however, only when an issue has been tried by express or implied consent of the parties" (Opinion, *infra*, p. A24). We insist that a party cannot have consented to trial of an issue which is first asserted in an appellate court two and one-half years after the trial. An issue which was unknown to either the litigants or to the trial court could not have been tried, by consent or otherwise.

It has been held that the Fifth Amendment guarantees to a litigant the right to be present at all stages of a trial in the courts of the United States. *Arrington* v. *Robertson*, 3 Cir., 114 F. 2d 821. How much more important it is that a litigant be afforded an opportunity to present evidence upon the issue upon which his case is decided. Surely such a guaranty is also implicit in the Fifth Amendment.[5]

It was a departure from the Rules of Civil Procedure to consider a defense which had not been pleaded. It was a departure from accepted appellate procedure to consider a defense not raised in the trial court. But those deviations from the accepted and usual course of judicial proceedings were minor in relation to the court's action in depriving petitioners of their day in court. If the appellate court felt impelled to permit the raising of a new factual defense in that court, it was required at least to re-

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[5]"The right to be heard on their claims was a constitutional right and the denial of that right to them was the denial of due process, which is never harmless error." *Republic National Bank* v. *Crippen*, 5 Cir., 224 F. 2d 565, at p. 566, citing *Philadelphia Co.* v. *Securities & Exchange Commission*, D. C. Cir., 175 F. 2d 808, and *Interstate Commerce Commission* v. *Louisville & Nashville Rld. Co.*, 227 U. S. 88, 91.

mand to the district court for a trial of the issue, with an opportunity to produce evidence being afforded. The procedure adopted by the Court of Appeals was a violation of a fundamental right guaranteed by the Fifth Amendment.

PRAYER.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said court had in the case numbered and entitled on its docket No. 4916, Sammy Kaye and David Krengel, Appellants, v. L. C. Smitherman and Simon Cohen, Appellees, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment of said United States Court of Appeals for the Tenth Circuit insofar as it affirmed the action of the trial court in charging respondents as constructive trustees for only a one-fourth instead of a one-half interest in the 914 acre block of leases be reversed by this court, and for such further relief as to this court may seem proper.

Dated October 12, 1955.

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APPENDIX A.

Constitution, Statutes and Rules Involved.

Constitution, Amendment Five:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U. S. C. A., Section 1291:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U. S. C. A., Section 2106:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the _____ of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Rules of Civil Procedure, Rule 8(c):

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

Rule 12(h):

> "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

Rule 15(b):

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as

may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to neet such evidence."

Rule 52(a):

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

APPENDIX B.

Opinion of the Court of Appeals.

Before Phillips, Chief Judge, and Bratton and Huxman, Circuit Judges.

Phillips, Chief Judge.

This is an equitable action brought by Sammy Kaye and David Krengel,[1] members of a joint adventure, to impress a constructive trust upon certain oil and gas leases acquired by their co-adventurers, L. C. Smitherman and Simon Cohen,[2] and to seek an accounting with respect

Kaye, who is in the music business, and his business manager, Krengel, were interested in engaging in oil ventures. Sometime in May, 1951, Kaye became acquainted with Walter H. Helmerich, President of both Helmerich & Payne, Inc., and its affiliate, White Eagle Oil Company. Their acquaintance ripened into a warm friendship. It was Helmerich's desire to enable Kaye to participate in oil ventures which might prove mutually profitable to Kaye and Helmerich & Payne, Inc. Helmerich introduced Kaye to Erik K. Waering, chief geologist for Helmerich & Payne, Inc. Whereupon, Waering became Kaye's adviser and agent in subsequent oil negotations and actively advised him with respect thereto on many occasions.

In June, 1951, at Hutchinson, Kansas, Kaye met Smitherman. Cohen was a partner in the Smitherman & Cohen Drilling Company, of Eldorado, Kansas. Kaye

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[1]Hereinafter referred to collectively as plaintiffs.

[2]Hereinafter referred to collectively as defendants.

thereto.

was not acquainted with and had no direct contacts with Cohen. At the time of such meeting, Smitherman informed Kaye that he was in the oil business. At that time Kaye requested Smitherman to let him know if any deals arose in which he might want outside capital, as he would be interested. Smitherman subsequently submitted a number of propositions, all of which Waering checked, and one of which Kaye accepted. All of the wells drilled in that venture were dry.

Helmerich & Payne, Inc., were joint owners with the Freeport Sulphur Company of a contiguous block of leases covering 1,040 acres, of which 800 lay in Cowley County, Kansas, and 240 in Kay County, Oklahoma. In January, 1951, Helmerich & Payne, Inc., and the Freeport Sulphur Company drilled a dry hole on one of the leases in Kay County. However, the leases were kept in effect.

On August 30 or 31, 1951, Waering telephoned Kaye in New York, described the above block of leases, and stated that his company wanted development in that area. He told Kaye that there was production three-quarters of a mile to the south, that the geology was good, and that they would pay $1.00 a foot dry hole money for an offset, making it a cheap deal for Kaye. Kaye replied that he would take any deal that Waering recommended. Waering went on to explain that Kaye would have to take someone in with him as Helmerich & Payne, Inc., could not put up dry hole money and also do the drilling. Kaye told Waering to offer Smitherman half of the deal. On the same day, Krengel acquired one-third of Kaye's one-half interest in the venture.

A few days after Waering talked to Kaye, Smitherman telephoned Waering in regard to a lease in which Kaye had taken an interest. During this conversation Waering told Smitherman that Helmerich & Payne, Inc.,

and the Freeport Sulphur Company were the owners of a large block of leases in Cowley County, Kansas, and Kay County, Oklahoma; that it contained a stratigraphic trap and was an attractive area; that Helmerich & Payne, Inc., would pay $1.00 a foot dry hole money for an offset; that Kaye would go in as a 50-50 partner and had asked Waering to offer equal participation to Smitherman. Smitherman replied that he was interested and would come down as soon as his rig was free. Smitherman said he had a Cowley County map, but asked Waering to send him a map of Kay County, which he subsequently did.

A few days prior to September 17, 1951, Smitherman telephoned Waering he was ready to start to work on the deal and that he would call upon him on September 18. Waering reported this conversation to Kaye and to Helmerich. On that date, Smitherman called upon Waering in the office of Helmerich & Payne, Inc., at Tulsa, Oklahoma. At this meeting, Waering produced a geological map, which he used to give Smitherman a detailed explanation of the geology of the area in which they were interested in Kay County, Oklahoma, and Cowley County, Kansas. The two counties adjoin each other. The map contained contour lines connecting the top of the Mississippi Limestone formation as indicated by the logs of all wells which had been drilled in that area; it showed the presence or absence of sandstone in all wells drilled and the thickness of the sand, where present; it showed the likely presence of a stratigraphic trap of Burbank Sandstone running in a northwesterly direction over the entire area. Waering explained the significance of this data. He explained what was meant by a stratigraphic trap and to illustrate his explanation he drew in front of Smitherman upon the map itself a pen and ink sketch of the sand pressed against the high. He explained that the fact that the well drilled by Helmerich & Payne, Inc., in Kay

County, in January, 1951, was dry indicated that the trap lay to the west of that well. He further explained that the trap ran all the way from Section 33 in Kay County up through Sections 7 and 8 in Cowley County, and that it had to run west of the dry hole in the center of Section 8 in Cowley County. It extended well into the area embraced by the 914-acre block of leases referred to hereinafter. He discussed with Smitherman the data, including electric logs where available, on every well theretofore drilled in both townships through which the stratigraphic trap extended, and pointed out the location of the Helmerich & Payne, Inc., block of leases, which was about in the middle of the area he described as containing the stratigraphic trap. He explained to Smitherman "that it was good all the way north," but told him that since production was already established in Section 20 in Kay County, he should get as close to it as possible. On a Kay County map he drew cross marks covering the North 1/2 of the Southwest 1/4 and the West 1/2 of the Southwest 1/4 of Section 17 in Kay County, and told Smitherman to see if he could not get a farm out on one or the other of those 80-acre tracts. He also pointed out Atlantic Refining Company's acreage adjoining and told him to see if he could not get dry hole money from them.

The disclosure of this confidential information by Waering to Smitherman on behalf of Kaye was for the use and benefit of the joint adventure.

After this meeting with Waering, Smitherman contacted G. L. Seibel, a lease broker and land man, to check into the availability of a least on the west 1/2 of the Southwest 1/4 of Section 17 in Kay County. Seibel was unable to procure this particular 80 acres, but did succeed in securing a farm out of the Conners Lease covering the East 1/2 of the Northeast 1/4 of Section 18 in Kay County. Sei-

bel's services were paid one-half by plaintiffs, and one-half by defendants. In the latter part of September, Smitherman informed Waering that he had been unable to secure a lease on the Southwest 1/4 on Section 17, but that he had secured the Conners Lease in Section 18. Waering told him that it would suit both Helmerich & Payne, Inc., and Kaye just as well. While Smitherman had not imparted to Seibel any information as to the geology of that particular area, Seibel during the course of his negotiations in behalf of Smitherman learned that the leases for which he was negotiating were regarded as extremely valuable and that Smitherman proposed to drill a well in the area. All of Seibel's knowledge, however, did not result by reason of his agency for the joint venture. Seibel was an exponent of a geochemical method of locating the presence of sub-surface oil in place. Essentially this method consisted of transporting chemicals in glass vials over the surface of the area and interpreting the resultant chemical changes. Seibel was convinced by his own investigation of the presence of sub-surface deposits of oil in that locality. Acting on the information gained from his investigation and his lease negotiations, Seibel procured a lease on the East 1/2 of the Northwest 1/4 of Section 17, Cowley County, Kansas, known as the McKay lease. After the negotiations for the McKay Lease had started, but prior to its execution, Seibel telephoned Smitherman on September 27 and told him he had arranged for the McKay Lease and could get leases on the adjoining Stacy eighty, the Klink Scott quarter immediately north of the two above-mentioned leases, and the Blatchford quarter immediately east of the Klink Scott quarter,[3] and further that the leases were so situated that Smitherman could

[3]These leases are hereinafter collectively referred to as the 480-acre block.

get good dry hole money. He telephoned Smitherman again a time or two before Smitherman went down to look the area over on October 2 or 3.

In the interim between the time Seibel first telephoned Smitherman and Octorber 2 or 3, when Smitherman first visited the area with Seibel, and on about October 1, 1951, Smitherman telephoned Waering in regard to the 480-acre block. In this conversation, Smitherman told Waering he had been able to get 400 acres in Cowley County offsetting the White Eagle block; he described the McKay eighty, Stacy eighty, Blatchford quarter, and the West 1/2 of the Klink Scott quarter; he omitted to mention the East 1/2 of the Klink Scott quarter, for which he was negotiating, which is hereinafter sometimes referred to as the "hold out eighty." He also asked that the Conners Lease in Kay County be expanded to a two well deal with $2.00 per foot dry hole money for him and Kaye on a well in the southeast corner of the McKay eighty. Waering expressed his approval of this proposition, but told him he would have to report to Kaye. Waering expressed doubt as to whether he would be in a position to give as much as $2.00 per foot. Smitherman said he would like to drill the Cowley County well first. Waering replied that since both leases were part of the same geology, it made little difference which was drilled first. Waering reported the conversation to Helmerich and talked to him about the amount of dry hole money.

Following this conversation, and on October 2 or 3, Smitherman accompanied Seibel to the McKay Lease. Seibel showed Smitherman a map indicating White Eagle as owner of the offset acreage. Smitherman said he was acquainted with them and thought he could get support money. He told Seibel he would take the deal and give him a 1/16th overriding royalty and directed Seibel to go ahead

and get leases on the Klink Scott and Blatchford quarters and on the Stacy eighty, the remaining leases in the 480-acre block.

On October 8, Waering reported to Kaye that Smitherman had been able to get 400 acres in Cowley County; that Helmerich & Payne, Inc., would pay $5,000 dry hole money on the Cowley County well and that the deal had been expanded to include the drilling of two wells. Kaye said he would rely on Waering's recommendation and to count him in. The following day Waering reported to both Smitherman and Smitherman's wife that he had talked to Kaye and that everything was progressing satisfactorily "on the Sammy Kaye deal."

That same day, October 9, Seibel and the defendants entered into a written contract under the terms of which the defendants contemporaneously reimbursed Seibel for the $1.00 per acre paid the landowners and further agreed to drill a well on the McKay Lease, and in return Seibel agreed to assign the McKay, Stacy, Blatchford, and Klink Scott Leases comprising the 480-acre block to the defendants, subject to his 1/16 override. The standard contract form was altered to provide that even if the defendants did not drill the well, they were still entitled to assignment of all the leases, except the McKay Lease.

On October 10, Smitherman prepared separate contract letters for Kaye, one describing the Conners Lease in Kay County, Oklahoma, and the other describing 400 acres of the 480-acre block in Cowley County, Kansas. The latter contract mentioned only the West 1/2 of the Klink Scott quarter and omitted to mention the East 1/2 thereof, thereby "holding out" that particular 80 acres from the contract negotiations. Kaye's acceptance of the contract letters was dated November 1, 1951, but they were not returned to the defendants until November 14, 1951.

Over a long period of time Smitherman had received financial support from Frank and Ronald Rice, who had taken interests varying from 1/4 to 1/2 in some 40 or 50 of his drilling ventures. Sometime in October, 1951, Smitherman showed the area to the Rices and told them that it was a two well deal, one-half of which was owned by Sammy Kaye. He told them that he had 80 acres in Oklahoma (the Conners Lease) and 400 acres in Kansas, referring to the 480-acre block. They first learned that he had concealed his ownership of the East 1/2 of the Klink Scott Lease after the McKay well had been drilled. Smitherman made no mention of the geological information he had received from Waering and disparaged the prospect of securing a well. The Rices finally took a total of 1/8, rather than their usual 1/4 to 1/2.

Drilling of the McKay No. 1 was commenced October 17, 1951. Between that date and October 23, Seibel secured leases on nine tracts of land to the north and west of the 480-acre block acquired prior thereto; they were the Bergkamp, Scott, Mulvaney, Richardson, Moore, G. H. Brown, Tibbets, E. B. Brown, and Broce, containing approximately 914 acres, all in Cowley County. This block adjoins on the north the previously acquired 480-acre block with a common boundary 3,630 feet long. Seibel paid nothing for the leases at the time, all of them being placed in escrow. The securing of these leases was not disclosed to the plaintiffs.

From a drill stem test and an electric log run on October 30, it was known that McKay No. 1 was a good well. Following the drill stem test, L. E. Fitts, Jr., who had been sent by Helmerich & Payne, Inc., and Waering, in particular, as geologist on the McKay No. 1, told Smitherman that based upon his experience it was his opinion

that there was a good-sized oil field there, which would extend an unlimited distance to the north.

On November 5, Smitherman entered into a contract with Seibel in relation to the 914-acre block previously mentioned. The contract provided for the payment by the defendants of the $641.00 necessary to get the leases out of escrow, plus $500.00 to Seibel in reimbursement for expenses, the drilling of a well on the Bergkamp Lease prior to January 12, and the assignment of the leases by Seibel to the defendants, reserving an overriding royalty of 1/16th. None of these facts were disclosed to plaintiffs. For the reasons hereinafter indicated we have concluded Smitherman only acquired a one-half interest in the leases covering the 914-acre tract.

With the exception of the Broce Lease, the leases in the 914-acre block were removed from escrow on November 13, 1951. With the exception of the Bergkamp Lease, the assignment of which was recorded on December 26, all of such leases and assignments to the defendants were withheld from record until after the drilling of Bergkamp No. 1. The Bergkamp Lease, the northermost lease in the 914-acre block, was three-fourths of a mile from the nearest point on the original 480-acre block and three miles from the McKay No. 1 well.

At about the time drilling was commenced on McKay No. 1, Smitherman sent Seibel out to get a third group of leases. These were the Stacy forty (NE 1/4 NE 1/4 S 18) and the Allen forty (SE 1/4 NE 1/4 S 18). Between the time McKay No. 1 came in on October 30 and December 6, Smitherman sent Seibel out to acquire a fourth group of leases. They were the Klink Scott No. 2 eighty (E 1/2 SE 1/4 S 7), Cullers forty (NW 1/4 SE 1/4 S 18), Whyte eighty (W 1/2 SE 1/4 S 7), and west Stacy eighty

(W 1/2 NE 1/4 S 18). All of the leases were taken in the name of Seibel and subsequently assigned by Seibel to the defendants. The entire 360 acres comprising these last two groups of leases adjoined the 480-acre block on the west. None of the facts involved in these transactions were disclosed to the plaintiffs.

On November 25 and 26, Krengel visited the area. At that time he asked Smitherman whether they could not pick up any additional acreage and was told by Smitherman that Helmerich & Payne, Inc., had it all tied up. At that time Smitherman had already acquired every lease in controversy, except the west Stacy eighty, but had made no disclosure of this fact to either Kaye or Krengel.

On December 13, in the defendants' suite at the Mayo Hotel, in Tulsa, Smitherman told Waering that he had picked up a couple of eighties west of the McKay. Waering told him he would have to let Kaye have his half. Smitherman said he would do so.

On January 4, 1952, Waering received from Mid-Continent Map Company, of Tulsa, a revised map of Crowley County. That map revealed that Smitherman had secured leases on 360 acres adjoining the original 480-acre block on the west and revealed that Smitherman also acquired, but had held out, the E 1/2 of the Klink Scott Lease covering the SW 1/4 of Section 8 and located in the very center of the original 480-acre block. Prior to receipt of the map, neither Waering nor the plaintiffs had any knowledge of the defendants' ownership of any of these leases. Waering immediately wrote to Kaye advising him of this discovery, enclosed a map, and stated he would see to it that Smitherman gave up the half interest to which Kaye was entitled. Later that same day, Smitherman tele-

phoned Waering about a well he was to drill under contract for Helmerich & Payne, Inc. Waering immediately demanded for Kaye his half interest in the leases last referred to above. Smitherman said: "Erik, you know I intend to take care of the boys all the way anyway. I intend to do right by the boys, don't worry."

Krengel arrived in Tulsa on January 11, 1952, and accompanied by Waering drove to Arkansas City, Kansas, where the next day they talked to the defendants and demanded a half interest in the 360-acre block and in the withheld Klink Scott eighty. A further discussion with Smitherman took place the following morning. Smitherman put his arms around Krengel and said, "I will come down to Tulsa tomorrow. We will get it all squared away."

With the exception of the Bergkamp Lease and assignment, all the other leases and assignments to the defendants in the 914-acre block were filed for record between January 3 and January 26, 1952.

The Mid-Continent map received by Waering did not reveal the ownership by the defendants of the Broce, Moore, G. H. Brown, E. B. Brown, Scott No. 2, Mulvaney, or Richardson Leases. It did reveal their ownership of the Bergkamp Lease. Located as it was, three-fourths of a mile from the nearest point on the original block and three miles from the McKay No. 1 discovery well, there was nothing about that lease to indicate a connection with the original block, The earliest date that even a physical connection between the Bergkamp Lease and the original block could have been discovered, was January 26, 1952, when the assignment to the defendants of the Broce Lease was recorded. The Broce Lease closed the three-fourths mile gap between the original block and the Bergkamp Lease on the north.

Prior to the filing of the suit on February 14, 1952, three wells were completed on the 914-acre block in addition to the McKay No. 1 in the 480-acre block completed October 30, 1951, and all producing wells on both blocks are producing from the same formation at approximately the same depth.

None of the facts in relation to the acquisition of the 914-acre block by the defendants were disclosed or ascertainable by the plaintiffs until a deposition of Seibel was taken. The material facts thus disclosed included the fact that the leases had been collected into a block; that the opportunity to acquire the block arose out of Seibel's obligation to the defendants, by reason of the joint adventurers having drilled the McKay No. 1, and further the price paid and obligations assumed by the defendants in acquiring the block.

The plaintiffs were without knowledge of most of the facts constituting their claim against the defendants, and all of the facts necessary to an intelligent election as to whether to waive their claim to a one-half interest in the leases in controversy, namely, the 914-acre block, the 360-acre block, and the "hold out eighty," or to assert it and assume half of the burdens incident thereto. The plaintiffs timely filed their complaint in this cause on February 14, 1952, electing to share in the leases in controversy to the extent of their one-half interest therein and offering to assume their one-half share of the cost of acquiring, developing, and operating them.

On October 29, 1953, the court found that the relationship between plaintiffs and defendants was a joint adventure and fiduciary in nature; that the opportunity to acquire the leases was one belonging to the joint adventure and that the defendants, Smitherman and Cohen, stood

charged as trustees for the plaintiffs, Kaye and Krengel, as to a one-half interest in the leases in controversy. On November 4, 1953, the defendants filed a motion asking that the court find specifically the ownership of the various leases and to further find that the plaintiffs were entitled only to a one-half interest in what the defendants still retained after assignments of interests to strangers to the litigation. Counsel stipulated on the ownership of the leases, subject to plaintiffs' objection "that the facts herein stated are outside the issues and plaintiffs' contention that the facts herein stated are not in evidence and their objection to the introduction of additional evidence at this late date, which objections are not waived."

The stipulation also revealed that all transfers or agreements to transfer interests in the Klink Scott "hold out eighty" and in the 360 acres to the west of the original 480-acre block, except for the Stacy eighty, were made after demand by the plaintiffs upon the defendants for a one-half interest therein. Some of the transfers were made *pendente lite*, subject to proportionate reduction if the plaintiffs prevailed in the lawsuit.

The court overruled the plaintiffs' objections, made an additional finding, and substituted new conclusions of law where pertinent, the effect of which was to reduce the plaintiffs' interest to one-half of the interest still owned by the defendants at the time suit was filed. The court made no distinction as to transfers made after demand by the plaintiffs for a one-half interest in the leases.

It is appropriate first to consider the cross-appeal in Number 4917. The defendants, Smitherman and Cohen, now acquiesce in the trial court's decree regarding the "hold out eighty" and the 360-acre block. They do challenge the correctness of the decree in so far as the 914-acre block is concerned, asserting for a reason therefor that it

was acquired through independent transactions outside the scope of the joint adventure.

It is immaterial that Seibel either held or acquired the leases on the 914-acre block independently, if the defendants improperly utilized confidential geological information imparted to them for the benefit of the joint adventure and if the acquisition of the leases so obtained by them from Seibel was within the scope of the joint adventure. This, then, is the question to be resolved.

At the outset it is well to recall the geological characteristics of the 914-acre block in question. It is contiguous to the 480-acre block which offset the original Helmerich & Payne, Inc., holdings and which concededly was included in the adventure, with a common boundary 3,360 feet in length, so as to present a single block of leases without interruption.

The trial court found that "The subject of the joint adventure at the outset was the securing and developing with the aid of dry hole money from Helmerich & Payne of leases offsetting the Helmerich & Payne block. The acquisition and development of the 480-acre block was an integral part of the subject matter of the joint adventure. The acquisition and development by the defendants of every lease in controversy, except the Miller Lease, was a business opportunity which was the natural outgrowth * * * of the joint adventure which existed from the outset and was within the reasonable contemplation of the parties from the beginning."

The evidence clearly discloses that Kaye was possessed of a business opportunity offered to him alone by Helmerich & Payne, Inc. As a part of that opportunity, Helmerich & Payne, Inc., tendered confidential geological information and dry hole money. Instead of exploiting

the opportunity by himself, alone, as he had a right to do, he chose to share the opportunity with Smitherman as a joint adventurer, with Smitherman as manager of the enterprise. When Kaye offered participation to Smitherman, it was not known what leases, if any, could be secured; what amount of dry hole money Helmerich & Payne, Inc., would agree to for what particular offsets, nor whether production would be obtained. The acquisition of the block of leases now in controversy was a continuation of the exploitation of that opportunity. The sharing of the opportunity did not restrict or reduce the scope of the opportuiity. It is apparent from the record, and the trial court so found, that the 914-acre block was acquired in reliance on the geological information furnished by Waering and Fitts. All wells are producing from the same formation from approximately the same depth.

The defendants made no disclosure of the opportunity to acquire the 914-acre block, or of their acquisition of it. They withheld all of the leases, except the Bergkamp Lease, from record until after the drilling of Bergkamp No. 1. On November 25 or 26, 1951, Krengel asked Smithreman if they could pick up any additional acreage and Smitherman said Helmerich & Payne, Inc., had it all tied up, although the fact was that he and Cohen at that time had all the leases now in controversy. On two occasions, Smitherman promised Waering that he would "take care" of Kaye in regard to the "hold out eighty" and the 360 acres to the west of the 480-acre block.

The trial court found that each and every one of these failures to disclose, concealments, and misrepresentations "were all intended to and did prevent plaintiffs' discovery of the material facts constituting their claim against defendants until after suit was filed." The finding is not challenged, but it is argued that the defendants' intent to de-

fraud is immaterial. Even if that were so, the defendants' construction of the scope of their adventure is not immaterial. Both parties construed their adventure to cover any leases obtainable in the area which they were engaged in developing. Under Kansas law their construction would have governed over even a written contract.[4]

It is elemental that ordinarily the findings of a trial court on uncontroverted factual issues will not be disturbed on appeal unless clearly erroneous.[5] The trial court's finding that these leases were acquired in furtherance of the joint adventure is amply supported by the evidence.

The defendants further assert that the plaintiffs' inaction and failure to assert any claim until after the defendants had risked their capital and developed the 914-acre Bergkamp Block, in view of the knowledge which the plaintiffs possessed, or could by the exercise of reasonable diligence have ascertained, constitutes laches.

The trial court found that Waering in his capacity as an employee of Helmerich & Payne, Inc., and not in the capacity as agent for Kaye, knew of the drilling of the Bergkamp No. 1, although he did not know its exact location; and that Kaye knew nothing of the drilling of any of the wells until after suit was filed.

In the light of the evidence previously set out, it is clear that the plaintiffs were without knowledge of most of the facts constituting their claim against the defendants and of all the facts necessary to an intelligent election as to whether to waive their claim to a one-half interest in

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[4] *Winter* v. *Miller*, 10 Cir., 183 F. 2d 151, 153, 154.

[5] *United States* v. *Chicago, R. I. & P. Ry. Co.*, 10 Cir., 171 F. 2d 377, 380.

the leases in controversy or to assert it and assume half of the burdens incident thereto. Laches cannot afford a defense, since the plaintiffs have at all times, after becoming aware of the deception, been diligent in the assertion of their claim.

Turning now to a consideration of the main appeal. The plaintiffs challenge the correctness of the trial court's order, the effect of which was to reduce their interest to half of the interest still possessed by the defendants at the time suit was filed, rather than awarding one-half of the latter's originally acquired interests prior to transfers to other individuals.

The parties hereto, after the entry of the original decree on October 29, 1953, and in response to a motion directed to the findings of fact and conclusions of law entered therein, stipulated as to the ownership of the various leases in controversy. This stipulation dated February 15, 1954, was entered into subject to the plaintiffs' objection that the facts stated were outside the issues and not in evidence and that the introduction of such additional evidence at that time came too late.

It is the position of the plaintiffs that the defendants were trustees *ex maleficio*, and as such lacked power to transfer the interests of plaintiffs as beneficiaries in the leases; that as joint adventurers the defendants had no authority to transfer the interest of their co-adventurers in the joint property; and, lastly, that there was neither pleading nor proof that such transfers to third persons of interests in the joint property were in furtherance of the joint adventure.

However, with respect to the leases covering the 914-acre block, we are of the opinion Smitherman acquired only a one-half interest therein and that the other one-

half interest was acquired by the Rices. It is true the transaction was cast in the form of an assignment of such leases by Seibel to Smitherman and a reassignment of a one-half interest therein by Smitherman to the Rices.

We think, however, the evidence clearly established that before the assignments were made by Seibel to Smitherman, the latter and the Rices had agreed that the Rices would receive a one-half interest in such leases and that in substance and legal effect Smitherman acquired for himself only a one-half interest in such leases and that he acquired the other one-half interest in such leases for the benefit of the Rices and was obligated to reassign such one-half interest to the Rices.

It is true that Smitherman and Cohen did not affirmatively plead that they only acquired a one-half interest in the leases covering the 914-acre tract, but evidence was introduced without objection relating to the time when, and the circumstances under which, the Rices acquired their one-half interest. No objection was made to that evidence on the ground that it was outside the issues in the case. Accordingly, the pleadings should be regarded as amended to conform to the proof. Hence, we conclude that Smitherman should account to Kaye and Krengel for a one-fourth interest in the leases covering the 914-acre tract. It is true that the trial court reached its judgment on a different ground, but it is well settled that a judgment or decree which is correct in effect will not be disturbed on appeal, although predicated on an erroneous ground by the trial court.

By intentionally breaching their fiduciary obligation to plaintiffs, defendants became constructive trustees for plaintiffs' one-half interest in the leases in controversy

from the date of their acquisition of each lease.[6] From that moment defendants became constructive trustees *ex maleficio*, of all the trust property, and were restricted in their dealings with the property to such duties as the law imposed upon them as such trustees.[7] By their repudiation of the joint adventure, so far as it related to the leases in controversy, the defendants lost their right to deal with the property as joint adventurers and were confined to the duties imposed by law upon them as constructive trustees. At the same instant, the plaintiffs became the equitable owners of an undivided one-half interest in such leases,[8] except the leases covering the 914-acre tract, and as to those leases they became the equitable owners of an undivided one-fourth interest.

Except as to *bona fide* purchasers for value, without notice, the plaintiffs and not the defendants were the real owners of such undivided interests. Any alienation of plaintiffs' interest by defendants would have been a wrongful act and the defendants may not assert authority to commit a wrong against the plaintiffs. When the defendants transferred interests in the leases to third persons they necessarily transferred their own and not the plaintiffs' interest.[9]

The problems created by transfers of interests to good faith purchasers for value, without notice, are not here present. While it is true that certain interests were trans-

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[6]*Cann* v. *Barry*, 298 Mass. 186, 10 N. E. 2d 88, 89; *Nelson* v. *Bailey*, 303 Mass. 522, 22 N. E. 2d 116, 120.

[7]*Petroleum Royalties Co.* v. *Hartford Acc. & Ind. Co.*, 10 Cir., 106 F. 2d 440, 442, 443, citing *Cann* v. *Barry*, *supra*.

[8]*Ohio Oil Co.* v. *Sharp*, 10 Cir., 135 F. 2d 303; *Oldland* v. *Gray*, 10 Cir., 179 F. 2d 408, 414.

[9]*Cascaden* v. *O'Connor*, 9 Cir., 257 Fed. 930, 933; *Dexter and Carpenter, Inc.*, v. *Houston*, 4 Cir., 20 F. 2d 647, 653, 654.

ferred by the defendants to other persons, at no time was more than their own interests so transferred. Whatever the defendants did with regard to their interest in the leases was of no legal concern to the plaintiffs as long as the latter's interest remained unimpaired; while dissolution of the joint adventure might result, the defendants were free to alienate their interest as they saw fit. The plaintiffs had no occasion or desire to litigate these issues with any of the transferees, nor was this matter ever in fact determined. The transferees were brought into the action by cross-complaint of the defendants who sought partition; subsequently on motion of the same defendants the action was dismissed as to such transferees some five months before the court filed its findings and conclusions on October 29, 1953.

The defendants' motion directed at the original findings and conclusions was founded entirely upon the premise that although defendants breached their fiduciary duty owed to plaintiffs and intentionally concealed their default in order to prevent discovery, they as joint adventurers still had the power to bind their plaintiff co-adventurers by assignments to strangers of interests in the subject matter of the joint adventure. This apparently upon the theory that such transfers were necessary to further the business affairs of the joint adventure.

It is the general rule that as between themselves a joint adventurer or partner of a non-trading partnership must have the express consent of his associates to transfer anything more than his own interest in the joint property.[10]

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[10]*Blaker* v. *Sands*, 29 Kan. 551, 557, 558; *McKibben* v. *Byers*, 138 Kan. 216, 25 P. 2d 357, 361, 362; *State* v. *Stokke*, 65 S. D. 207, 272 N. W. 811, 819; *Swanson* v. *Webb Tractor & Equipment Co.*, 24 Wash. 2d 631, 167 P. 2d 146, 155; *Meagher* v. *Reed*, 14 Colo.

All of the cases cited in the foregoing footnote indicate that one occupying a fiduciary relation must exercise the utmost good faith and candor in his dealings with the other party in regard to the joint property. This necessarily means full disclosure and consultation before the joint assets may be transferred or otherwise alienated. This statement applies with even greater force in the instant case, since the defendant, Smitherman, was the general manager of the enterprise.

In their answer to the complaint, defendants raised the general issue by their denial of the averments. They did not at that time raise any affirmative defense of authority upon their part to bind the plaintiffs by assignments to strangers. The first time that this contention was raised was by the filing of the motion directed to the pleadings and conclusions of law, dated February 15, 1954, some three and a half months after the entry of the original findings. It must also be borne in mind that the plaintiffs objected to this procedure on the ground that the facts as to the transfer of ownership interests were not in evidence and the introduction of such facts at that time came too late.

Rule 8 (c) of the Federal Rules of Civil Procedure requires the pleading of "any other matter constituting an avoidance or affirmative defense." Rule 12 (h) of the Federal Rules of Civil Procedure provides that defenses not raised by motion or answer are waived. We are not unmindful of the provisions of Rule 15 (b) of the Federal Rules of Civil Procedure authorizing amendments to conform to the evidence. That rule is applicable, however, only when an issue has been tried by express or implied consent of the parties.[11] The record here does not disclose such consent.

The cause is REMANDED with instructions to MODIFY the decree in accordance with the views expressed in this opinion.

335, 24 Pac. 681, 691; 30 Am. Jur., Joint Adventures, Sec. 43, p. 700.

[11] *Simms* v. *Andrews*, 10 Cir., 118 F. 2d 803.

APPENDIX C.

Judgment.

Thirty-Third Day, May Term, Monday, July 18th, 1955.

Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that these causes be and the same are hereby remanded to the said district court with instructions to modify the decree in accordance with the views expressed in the opinion of the court.